1886

ASHAN-ULLAH KHAN BAHADUR v. TRILOCHAN BAGCHI.

been the ground upon which the decree against the defendant No. 4 proceeded, because that was based on his admission, and that was a ground which could not apply to the defendant No. 1, who did not appear before the Munsiff. It is, therefore, clear that the judgment of the Munsiff did not proceed upon a ground common to the defendants Nos. 1 and 4.

That being so, the lower Appellate Court had no power to set aside the decree against the defendant No. 1, on the appeal of defendant No. 4.

We, therefore, set aside the decree of the lower Appellate Court so far as the defendant No. 1 is concerned, and restore the decree of the Munsiff against him with costs.

K. M. C. *Decree modified.*

Before Mr. Justice Mitter and Mr. Justice Grant.

1886
April 20.

ARJAN BIBI (PLAINTIFF) *v.* ASGAR ALI CHOWDHURI (DEFENDANT).*

Interest—Bond—Agreement—Penalty—Contract Act, s. 74—Act XXVIII of 1855, s. 2.

The stipulation in a bond was in these terms:—"I cannot pay Rs. 1,000 now, so I will pay it within two months and 15 days; if I do not pay it within that period, I will pay the amount with interest from the date of the bond at the rate of 2 annas per rupee per month": *Held*, that the stipulation was one for the payment of interest within the meaning of s. 2, Act XXVIII of 1855, and did not fall under s. 74 of the Contract Act.

Mackintosh v. *Crow* (1) approved.

Balkishen Das v. *Run Bahadur Sing* (2) considered.

THIS was a suit for the recovery of a sum of Rs. 2,600 as principal and interest due upon a bond. The bond stipulated that, unless the amount of the debt (Rs. 1,000) was paid within two months and 15 days of the date thereof, interest at the rate of 2 annas per rupee per month should run from the date of the bond. The defendant admitted execution; but pleaded (1) that prior to the institution of the suit he had tendered the money which was refused by the plaintiff's husband and

* Appeal from Appellate Decree No. 2038 of 1885, against the decree of R. H. Greaves, Esq., Judge of Chittagong, dated the 17th of June 1885, modifying the decree of Baboo Jiban Krishna Chatterji, Subordinate Judge of that District, dated the 28th of July 1884.

(1) I. L. R., 9 Calc., 689. (2) I. L. R., 10 Calc., 305.

agent; and (2) that the stipulation for the payment of interest was in the nature of a penal clause.

The Subordinate Judge was of opinion that the rate of interest agreed upon between the parties was not a penal sum, and held that the defendant's plea of tender and refusal had been satisfactorily proved. He accordingly gave the plaintiff a decree for Rs 1,000, the principal amount, and interest as stipulated in the bond up to the date of tender, *i.e.*, Rs. 437-8.

On appeal, the District Judge, relying on the authority of *Bansidhur* v. *Bu Ali Khan* (1), held that the aforesaid clause in the bond stipulating for payment of interest was of a penal character, and in modification of the decree of the lower Court allowed interest at the rate of Rs. 20 per cent. per annum.

The plaintiff appealed to the High Court.

Baboo *Akhil Chandra Sen* for the appellant.

Munshi *Serajul Islam* for the respondent.

The judgment of the Court (MITTER and GRANT, JJ.) was delivered by

MITTER, J.—The question for decision in this case is, whether the following stipulation in the bond upon which this suit was brought was a stipulation for the payment of interest or a stipulation which falls under s. 74 of the Contract Act, fixing a particular sum as the amount to be paid in case of a breach.

The stipulation is, "I cannot pay Rs. 1,000 now, so I will pay it within two months and fifteen days. If I do not pay it within that period, I will pay the amount with interest from the date of the bond at the rate of 2 annas per rupee per month."

It seems to us that this stipulation does not fall under s. 74 of the Contract Act. No sum is named here as the amount to be paid by the defendant in case of a breach. It simply stipulates that if the money is not paid within two months and fifteen days the borrower agrees to pay the amount borrowed with interest at the rate of 2 annas per rupee per month. It therefore falls within s. 2 of Act XXVIII of 1855.

The distinction between an agreement to pay interest at a

(1) I. L. R., 3 All., 260.

1886

ARJAN BIBI v. ASGAR ALI CHOWDHURI.

certain rate and an agreement to pay a certain sum of money as the amount to be paid in case of breach is stated in a decision of this Court in the case of *Mackintosh* v. *Crow* (1). Mr. Justice Wilson in delivering the judgment of the Court, after examining the various cases bearing upon this point and explaining the nature of the provisions of s. 2 of Act XXVIII of 1855, and s. 74 of the Contract Act, says: "In all such cases this element is present, that by the terms of the contract a sum is made payable by reason of the breach, capable of calculation at the time of the breach, and payable in all events, though in the second class of cases the payment is spread over a term. But where the contract is merely that if the money is not paid at the due date, it shall thenceforth carry interest at an enhanced rate, I do not see how it can be said that there is any sum named as to be paid in case of breach. No one can say at the time of the breach what the sum will be. It depends entirely on the time for which the borrower finds it convenient to retain the use of the money. It is a fresh sum becoming due month by month, *i.e.*, as the case may be, for a new consideration. And in my opinion the case falls under the first rule of law abovementioned, not under the second. This view of the law was acted upon by this Court in *Mackintosh* v. *Hunt* (2)."

It is true that in this case the rate of interest stipulated for is to be payable from the date of the loan; but this circumstance does not, in our opinion, take the case out of the purview of s. 2 of Act XXVIII of 1855; because there is only one rate of interest stipulated to be paid here. The bond does not provide for the payment of two rates of interest, one lower and the other higher, the latter being payable under certain circumstances. In this case it cannot be therefore held that a lower rate is the stipulated rate of interest agreed to be paid by the debtor under s. 2, Act XXVIII of 1855, and that a higher rate is named in order to determine the amount of compensation to be paid under s. 74 of the Contract Act in case of a breach. The agreement in this case is that no interest would be payable if the money covered by the bond be paid within the time mentioned in it, but if it be not paid within that time, interest at the

(1) I. L. R., 9 Calc., 689. (2) I. L. R., 2, Calc., 202.

rate of 2 annas per rupee *per mensem* would be payable. This agreement falls, in our opinion, under s. 2 of Act XXVIII of 1855.

We may point out here that the authority of the cases in which a higher rate of interest has been considered to be in the nature of a penalty has been much shaken by the decision of the Judicial Committee of the Privy Council in *Balkishen* v. *Run Bahadur Singh* (1). In that case a solenamah provided for the payment of six per cent. interest upon the money payable under it, but under certain circumstances the rate was to be doubled. Their Lordships observed: "They do not concur with the High Court that the payment of a double rate of interest was in the nature of a penalty. The solenamah was an agreement fixing the rate of interest, which was to be at the rate of 6 per cent. under certain circumstances, and 12 per cent. under others."

We are therefore of opinion that the lower Appellate Court is wrong in disallowing the stipulated rate of interest. We set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs.

K. M. C. *Appeal decreed.*

Before Mr. Justice Miller and Mr. Justice Grant.

RAM KISHORE GANGOPADHYA (ONE OF THE DEFENDANTS) *v.* BANDIKARATAN TEWARI CHOWDHRY (PLAINTIFF).*

1886 *April* 15.

Limitation Act, 1877, *Art.* 144—*Suit for possession.*

On the 7th December 1863, *A* in execution of his decree purchased and obtained symbolical possession of a certain 4-annas share, the property of his judgment-debtor. The 4-annas share was at the time under a mortgage to *B*, who happened to be in possession of the share as lessee. The term of the lease expired in 1870 or 1871. *A*, *C* and *D*, who were members of a Hindu joint family, afterwards came to a partition of their common estate in which was included the 4-annas share, and one of them, *D*, sold his share in the 4-annas to *B*, who, on the

* Appeal from Order No. 374 of 1885, against the order of Baboo Rajendra Coomar Bose, Subordinate Judge of Mymensingh, dated the 18th of July 1885, reversing the order of Baboo Shumbhu Chandra Nag, Munsiff of Issurgunge, dated the 26th of March 1885.

(1) I. L. R., 10 Calc., 305.